84-1925 (1)

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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

FRANK V. PONTERIO, PETITIONER
v.
EDWARD I. KOCH, both inidividually and as Mayor of the City of New York, THE CITY OF NEW YORK, CAROL BELLAMY, both individually and as President of the Council of the City of New York, THOMAS CUITE, both individually and as Majority Leader and Vice Chairman of the Committee on Rules, Privileges, and Elections of the Council of the City of New York, THE COUNCIL OF THE CITY OF NEW YORK, MELVIN MARKUS, both individually and as Chairman of the Council Redistricting Commission, and THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Frank V. Ponterio, pro se
766 Pelton Avenue
Staten Island, New York 10310
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QUESTION PRESENTED

Whether denial of a candidate's right to appear on the ballot for a municipal election, resulting from the failure of the municipality to comply timely with preclearance requirements of 42 U.S.C. 1973, et seq., is a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES
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FRANK V. PONTERIO, PETITIONER
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Frank V. Ponterio, pro se, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a-4a) is unreported. The opinion of the district court (App. A, infra, 5a-19a) is reported at 586 F. Supp. 77.

JURISDICTION

The judgement of the court of appeals was entered on Nov. 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fourteenth Amendment to the United States Constitution provides in part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law

2. The Voting Rights Act of 1965, codified in part at 42 U.S.C. 1973 (c), requires a covered municipality to preclear a redistricting plan before it is implemented.

3. The Civil Rights Act of 1871, codified at 42 U.S.C. 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Consititution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

Petitioner is a citizen of the United States, the city and state of New York, the borough of Staten Island, and the county of Richmond. He duly qualified to appear on the ballot for the Democratic Primary election for the public office of New York City Council Member, 35th councilmanic district, scheduled to be held on Sept. 10, 1981.

Pursuant to section 22 (g) of the New York City Charter, the New York City Council established a redistricting commission to redraw Council district lines based upon the 1980 census. A reapportionment plan was adopted by the City Council and signed into law, as Local Law 47, by the Mayor on June 6, 1981. Since the counties of the Bronx, New York, and Kings are subject to the preclearance

provisions in section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973, et seq., the plan was submitted for preclearance, on June 12, 1981, to the U.S. Department of Justice.

On August 4, 1981, the Department of Justice requested additional data. In response, respondents planned to and did submit the last of such data on September 21, 1981, eleven days after the scheduled primary election. On Sept. 8, 1981, a three-judge court enjoined the holding of all council elections pursuant to the proposed plan until the preclearance provisions of the Voting Rights Act had been satisfied. Herron v. Koch, 523 F. Supp. 167 (S.D.N.Y.; E.D.N.Y. 1981), application for stay denied, 453 U.S. 946 (1981). In reaching its decision, the court noted that the City conceded that preclearance was required before the

councilmanic changes could become effective, and that, with regard to the requested additional data, the court observed at 523 F. Supp. 174:

> Knowing that this information would facilitate action, the City consciously elected not to provide it because it was not technically required... [and] it consciously chose a course of action that was not designed to facilitate a swift and complete review by the Attorney General.

On October 27, 1981, the Attorney General rejected the proposed plan. Primary and general elections for City Council were subsequently cancelled.

Petitioner brought this action pursuant to 42 U.S.C. 1983, alleging a right, protected by the Fourteenth Amendment, to be a candidate for public office, and a violation of that right by virtue of the wrongful acts of respondents-defendants. Defendants' motion to dismiss on the pleadings was granted, and the U.S. Court

of Appeals for the Second Circuit affirmed.

REASON FOR GRANTING THE PETITION

This case presents an important question regarding the consitutional rights of candidates for public office which has not, but should be settled by this Court. Furthermore, the decision of the court of appeals conflicts with an earlier decision of this Court.

The existence per se of a federally protected right to vote and its concomitant right to run for public office in state elections has long been recognized:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike of the heart of representative government.
>
> Reynolds v. Sims, (1964), 377 U.S. 533,555.

Federal protection of such rights extends to all aspects of the electoral process, including administration by a state of state electoral nominating procedures:

> The use of nominating petitiions by independents to obtain a place on the Illinois ballot is an integral part of her elective system. See People v. Election Commissioners, 221 Ill. 9,18,77 N.E. 321,323. All procedures used by a State as an integral part of the electoral process must pass muster against the charges of discrimination or of abridgement of the right to vote. United States v. Classic, 313 U.S.299, 314-318; Smith v. Allwright, 321 U.S. 649,664.

Moore v. Ogilvie, 394 U.S. 814,818.

The court of appeals impliedly acknowledged the existence of a candidate's right to appear on the ballot, albeit subject to reasonable qualifications. However, the court held that "Attempts by municipalities to test their legal rights, even where delay may result, is not an unreasonable qualification" (App.

A, infra, 3a). This holding is in direct conflict with this Court's decision that the burden of any delays in the preclearance process shall be borne by the party responsible for obtaining preclearance under 42 U.S.C. 1973(c). Perkins v. Matthews, 400 U.S. 379, 396 (1971). The court of appeals would shift this burden to candidates, and confront them with a Hobson's choice; take the personal and financial risk of running in an election that might not be held, or don't run. Such a choice can have a chilling effect on a citizen's exercise of one of his most fundamental rights.

The court of appeals relies on American Party of Texas v. White, 440 U.S. 173 (1978) for its holding that a candidate's right to appear on the ballot is subject to reasonable qualifications. Essential to the holding in American

Party, however, was the Court's finding that those qualifications "are constitutionally valid measures, reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways, Id., 415 U.S. at 781. In the instant case, such measures were not reasonably taken. Defendants' plan to hold a primary election before preclearance could be obtained was a reckless violation of the unambiguous language of 42 U.S.C. 1973(c), compounded by what the Herron court found was defendants' conscious choice of "a course of action that was not designed to facilitate a swift and complete review by the Attorney General", 523 F. Supp. at 174, see also Wise v. Lipscomb, 437 U.S. 535, 542. Furthermore, other, less burdensome ways were available. The City could have retained existing councilmanic districts,

thus avoiding entirely the need for preclearance, or it could have sought a special councilmanic election timetable at the outset, arranged to allow sufficient time for preclearance. Furthermore, the holding of an election a year later did not negate the wrong to petitioner. This Court has held that even a temporary denial of the right to participate in a primary election may be violative of Fourteenth Amendment protection. Dunn v. Blumstein, 405 U.S. 330 (1972), Kusper v. Pontikes, 414 U.S. 51.

The district court, unlike the court of appeals, held that petitioner's right to be a candidate for a state-created office is not protected by the Due Process Clause of the Fourteenth Amendment, citing Snowden v. Hughes, 321 U.S. 1 (1944). In its Snowden opinion, the Court did not discuss the merits of a due

process claim but reaffirmed its decision in Taylor and Marshall v. Beckham, 178 U.S. 548. The Taylor and Marshall decision rested upon the Court's finding that the right to run for a state-created public office is not property as contemplated by the Fourteenth Amendment. The Snowden decision has been eroded by later voter and election cases, and the circuit courts have readily limited its potentially broad scope. Briscoe v. Kusper, 435 F.2d 1046, 1053 (7th Cir. 1970), Duncan v. Poythress, 657 F.2d 691,704 (5th Cir. 1981), Williams v. Sclafani, 444 F. Supp. 906,911, aff'd. mem. 580 F.2d 1046 (2d Cir. 1978). Quite apart from election cases, this Court has greatly expanded the sweep of rights and liberties protected by the Due Process Clause, thus eviscerating Snowden. The Court has abandoned the distinction between person-

al liberties and property rights:

> In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. (Citations omitted.) Congress recognized these rights in 1871 when it enacted the predecessor of [sec.] 1983 and 1343(3). We do no more than reaffirm the judgment of Congress today.
>
> Lynch v. Household Finance Corp., 405 U.S. 538,552 (1972).

In another case decided at the same term, the Court included within the scope of protected interests:

> The right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized...as essential to the orderly pur-suit of happiness by free men. Meyer v. Nebraska, 262 U.S. 390,399, 43 S.Ct. 625,626,67 L.Ed. 1042.

Board of Regents of State Colleges v. Roth, 408 U.S. 564,572.

Furthermore, the Court made it clear that such property interests include those that are entirely state created:

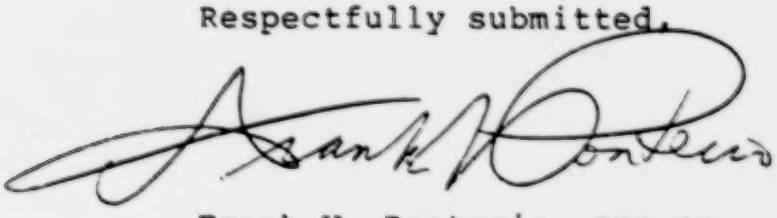
> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlements to those benefits
>
> Id. at 577.

Surely, public office is one of the "common occupations of life" and the right to appear on the ballot shares at least parity with the right "to acquire useful knowledge". Moreover, it is the manner in which a right is denied not the right itself which is at the heart of due process protection.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Frank V. Ponterio, pro se
Petitioner

February 15, 1985

APPENDIX A
THE DECISIONS BELOW

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-ninth day of November, one thousand nine hundred and eighty-four.

Present:

Hon. Henry J. Friendly,
Hon. Ralph K. Winter
Hon. George C. Pratt,
Circuit Judges.

Filed
Nov. 29, 1984

FRANK V. PONTERIO,
Plaintiff-Appellant,

v.

Docket No.
84-7537

EDWARD I. KOCH, both individually and as Mayor of the City of New York, et al,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United

States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Frank Ponterio, pro se, appeals the judgment of the United States District Court for the Eastern District of New York (Edward R. Neaher, J.) granting summary judgment on the pleadings and dismissing his complaint. Appellant alleged that the one year delay in holding the New York City Councilmanic primary elections from September, 1981 to September, 1982 pending Department of Justice approval of New York City's redistricting plan deprived him of his right to appear on the ballot under 42 U.S.C. 1983.

Mr. Ponterio had qualified to appear on the September, 1981 primary ballot and did appear on the September, 1982 ballot.

The right to appear on the ballot as a candidate for public office is subject to reasonable conditions and qualifications. American Party of Texas v. White, 415 U.S. 767, 781 (1974). We believe that a delay of a municipal election caused solely by the need to comply with federal law is not an unreasonable infringement upon a candidate's right to appear on the ballot. We believe this is so even when it is reasonably forseeable that the conduct of the municipality will result in a conflict with federal law and in a postponement of the election. Attempts by municipalities to test their legal rights, even where delay may result, is not an unreasonable qualification of the right to run for public

office, absent allegations of conduct purposefully directed to impairing a particular individual's candidacy, to discriminating against any group or individual, or to the undermining of the democratic process.

We therefore affirm.

HON. HENRY J. FRIENDLY, USCJ

HON. RALPH K. WINTER, USCJ

HON. GEORGE C. PRATT, USCJ

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - x

FRANK V. PONTERIO, : 83 CV 206

Plaintiff, : (ERN)

-against- :

EDWARD I. KOCH, both individually and as Mayor of the City of New York, et al, : MEMORANDUM AND ORDER

Defendants. :

- - - - - - - - - - - - - - - - x

APPEARANCES:

FRANK V. PONTERIO, ESQ.
Staten Island, New York
Plaintiff Pro Se

FREDERICK A. O. SCHWARZ, JR., ESQ.
Corporation Counsel, City of
New York, New York, N.Y.
Attorney for Defendants
By STEPHEN P. KRAMER, ESQ.
SUSAN R. ROSENBERG, ESQ.
JAMES F. X. HILER, ESQ.

NEAHER, District Judge.

(Judgment entered June 20, 1984)

Plaintiff invokes this Court's jurisdiction pursuant to 28 U.S.C. 1343 to seek redress for an alleged violation of 42 U.S.C. 1983.[1] According to the complaint, plaintiff, relying on the schedule published by the Board of Elections in June 1981, qualified to appear on the ballot in the Democratic party primary for New York City Council Member, 35th District. The Board of Elections had set the primary election for September 10, 1981, and the general election for November 3, 1981, but, as explained below, neither event occurred.

The counties of the Bronx, New York, and Kings in the City of New York are subject to the preclearance provisions of section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973, et seq. The statute requires officials in those counties to obtain approval of any

redistricting plan from either the United States District Court for the District of Columbia or the Attorney General of the United States.

Changes in population reflected in the census of 1980 had necessitated councilmanic district reapportionment throughout the City and in compliance with local law, the City Council adopted a proposed plan which the Mayor signed into law on June 6, 1981. The complaint does not state exactly when defendants submitted the plan to the Attorney General; however, there is no dispute that the date was June 12, 1981, and that defendants requested expedited review. On August 4, 1981, the Department of Justice requested additional data, the last of which was furnished on September 21, 1981. Prior thereto, however, on September 8, 1981, a federal court,

acting on a citizens' complaint, enjoined the holding of any election pursuant to the proposed plan until the provisions of the Voting Rights Act had been satisfied. Herron v. Koch, 523 F.Supp. 167 (S.D.N.Y.; E.D.N.Y. 1981) (three-judge court) (per curiam) (consolidated cases), application for stay denied, 453 U.S. 946 (1981).

The date of September 21, 1981, was also significant because, under the applicable regulations, the Attorney General's 60-day period for considering the proposed plan began to run anew. On October 27, 1981, the Attorney General rejected the proposed plan. In response, the Board of Elections cancelled the November 3, 1981, councilmanic election. Primary elections for City Council were not held again until September 1982, at which time plaintiff was unsuccessful in

his bid for the Democratic nomination.

Essentially, plaintiff charges that defendants' negligence and carelessness deprived him of his civil right to run for public office in the 1981 primary election. Specifically, he accuses defendants of failing both to seek and to obtain preclearance of the redistricting plan on a timely basis.

The case is before the Court upon defendants' motion for judgment on the pleadings. In assessing the sufficiency of the complaint's allegations, the Court must rely upon the pertinent language of 42 U.S.C. 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rghts, privileges, or immunities secured by the Constitution and laws, shall be liable

> to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Defendants contend that the complaint fails to allege the deprivation of a federally protected right.

The Supreme Court has instructed that

> "[t]he protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the law and Constitution of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law. The right to become a candidate for state office, like the right to vote for the election of state officers, is a right or privilege of state citizenship, not of national citizenship which alone is protected by the privileges and immunities clause.
>
> "More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion, as we reaffirm it now."

Snowden v. Hughes, 321 U.S. 1, 6-7 (1944) (emphasis added; citations omitted); accord Gruenburg v. Kavanagh, 413 F. Supp. 1132, 1135 (E.D. Mich. 1976); Vandross v. Ellisor, 347 F. Supp. 197, 201-02 (D.S. Car. 1972); Heiser v. Rhodes, 305 F. Supp. 269, 272 (S.D. Ohio 1969) (three-judge court) ("Secondly — it has been consistently held that, while a voter in a given case may have a right to require a 'one-man, one-vote' principle election, nonetheless a particular individual may not successfully assert any federally protected right to be a candidate for a state political office.").

Later authorities limit the potentially broad reach of Snowden v. Hughes so as not to preclude consideration of asserted violations of due process of law as guaranteed by the Fourteenth Amendment. Duncan v. Poythress, 657 F.2d 691,

704 (5th Cir. 1981), cert. dismissed, 455 U.S. 998 (1982); Briscoe v. Kusper, 435 F.2d 1046, 1052-53 (7th Cir. 1970). Unlike Briskoe and Egan v. City of Aurora, 365 U.S. 514 (1961) (per curiam), the instant complaint does not implicate freedoms or liberties protected by the First Amendment. See Wright v. Mahan, 478 F. Supp. 468, 470-71 (E.D. Va. 1979), aff'd, 620 F.2d 296 (4th Cir. 1980). Fairly read, however, its allegations charge, by way of implicit conclusion, that defendants' actions denied plaintiff due process of law.

The concept of liberty in the due process clause of the Fourteenth Amendment provides candidates with a limited right of access to the ballot. Williams v. Sclafani, 444 F. Supp. 906, 911 (S.D.N.Y. 1978), aff'd, 580 F.2d 1046 (2d Cir. 1978). A claimed deprivation of

this right is subject to the same test of consititutional scrutiny as an asserted deprivation of the right to vote. Moldonado v. Rodriguez, 523 F. Supp. 177, 180 (S.D.N.Y. 1981). These general statements of the law derive from factual settings unlike this case. See, e.g., Griffin v. Burns, 570 F.2d 1065, 1078 (1st Cir. 1978). Here, no election was held and, consequently, nobody appeared on the ballot; or, in other words, all persons, who otherwise qualified, were denied access to the ballot.[2] This distinction properly focuses the Court's inquiry upon fundamental fairness as urged in plaintiff's brief at 10. See Hendon v. North Carolina State Bd. of Elections, 710 F.2d 177, 182 (4th Cir. 1983); Griffin v. Burns, supra, 570 F.2d at 1077-78. The labeling of defendants' actions as tortious, however, does not

ipso facto taint the election process nor equate their actions with fundamental unfairness. Due process does not require defendants to be guarantors or sureties for the risks attendant to the submission of a redistricting plan for preclearance. No matter what the proposed plan contained, approval might not have been forthcoming. Consequently, to allege the deprivation of due process, at least in this context, plaintiff must plead that defendants submitted the plan on June 12, 1981, expecting that it would not be approved in time for the primary election they had scheduled for September 10, 1981.

The Court derives this requirement from the discussion in Williams v. Sclafani, 444 F. Supp. at 911-14, where several cases, including Briscoe v. Kusper, supra, and Griffin v. Burns,

supra, were analyzed. In those cases, as in Williams, the elections officials had misled the plaintiffs concerning the procedures applicable to their respective elections. See Andrews v. Hyde, 504 F. Supp. 891, 895-96 (D. Conn. 1980) (discussion therein); see also Eccles v. Gargioulo, 497 F. Supp. 419 (E.D.N.Y. 1980). In this case, there is no equivalent misrepresentation that the proposed plan would be acceptable to the Attorney General. Indeed, in view of the attendant publicity, all candidates were chargeable with notice that any election was necessarily tentative, i.e., subject to the plan's approval under the preclearance procedure.

Moreover, while the plan was pending, defendants sought to preserve the election timetable. They vigorously opposed the voters who persuaded a federal court

to enjoin the election. Thereafter, the State Legislature changed the primary date to September 22, 1981. Most significantly, the Attorney General's 60 days to review the June 12, 1981, submission initially expired on August 11, 1981, well before the scheduled primary election date of September 10, 1981.

For the foregoing reasons, the Court fionds that plaintiff has failed to state a claim entitling him to relief under 42 U.S.C. 1983. Accordingly, defendants' motion for judgment on the pleadings is granted, and the complaint is ordered dismissed.

SO ORDERED.

Copies of this Memorandum and Order are being forwarded to plaintiff pro se at 766 Pelton Avenue, Staten Island, N.Y. 10310; and to counsel for defendants.

_____
U.S.D.J.

Dated: Brooklyn, N.Y.
May 22, 1984

FOOTNOTES

[1] The complaint also cites 42 U.S.C. 1981; however, this statute is inapplicable because the complaint alleges no racial discrimination. See Runyon v. McCrary, 427 U.S. 160, 168 (1976).

[2] The facts are not in dispute, and as a result, the record contains any of several causes of the election's cancellation. The complaint traces the cancellation to defendants' alleged failure to obtain preclearance of the proposed redistricting plan, [sec.] 22, which in turn stems from having submitted the plan for preclearance in an untimely fashion. Paragraphs 23-26 of the complaint aver that, given their knowledge of the Attorney General's 60-day consideration period, "Defendants knew or should have known that it was patently impossible on the schedule established by defendants to obtain preclearance of the proposed council redistricting plan prior to the scheduled primary election on Sept. 10, 1981 or even prior to the scheduled general election on Nov. 3, 1981." Par. 24.

To the contrary, however, defendants requested the expedited review available under the law and apparently received, it, because on August 4, 1981 the Dept. of Justice requested additional material. The City did not furnish all the supplementary material until September 21, 1981, and from this event, plaintiff avers in [para.] 23 of the complaint that, "In reckless disregard for plaintiff's civil rights, defendants

F O O T N O T E S
(CONTINUED)

proceeded on schedule to obtain preclearance which provided for completion required by the Attorney General by Sept. 21, 1981, eleven days after the scheduled primary election, . . ." This allegation only implicitly challenges the validity of the redistricting plan and through 20/20 hindsight, assumes the plan was invalid. The complaint does not plead the plan and does not allege its invalidity. Thus it fails to identify the source of the defendants' alleged nonfeasance, malfeasance, misfeasance, negligence, carelessness, and reckless disregard for plaintiff's civil rights other than to imply that an earlier timetable for obtaining approval should have been established. See Herron v. Koch, 523 F. Supp. at 174-75 (discussion therein).

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973(c)

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973(a) of this title based upon determinations made

under the first sentence of section 1973(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or poltical subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section

1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard. practice, or procdure does not have the purpose and will not have effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 973b(f)(2) of this title, and unless and until the court enters such judgment, no person shall be denied the

right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's

failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

NEW YORK CITY CHARTER
Section 22

e. The council shall establish a city council districting commission to prepare a draft plan for dividing the city into council districts pursuant to this charter for the election of council members other than council members at large at the general election in the year nineteen hundred seventy-seven and at the first regular election of council members after each federal census thereafter. The districting commission shall consist of nine members to be appointed by the council. It shall be nonpartisan and its membership shall reflect the political, geographic, and ethnic composition of the city. The council shall provide necessary staff to the districting commission and the commission may call upon the department of city planning and other agencies for technical assistance. The dis-

tricting commission shall hold a public hearing on any proposed redistricting plan prepared by it and the council shall take final action on the plan by local law pusuant to this chapter. (Formerly subd. g, relettered and amended by L.L. 1977, No. 102 Dec. 30, eff. Jan. 1, 1978, which repealed former subd. e; amended by L. 1978, ch. 763, August 7.)

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No. 84-1325 (2)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

FRANK V. PONTERIO,

Petitioner,

v.

EDWARD I. KOCH, both individually and as Mayor of the City of New York, THE CITY OF NEW YORK, CAROL BELLAMY, both individually and as President of the Council of the City of New York, THOMAS CUITE, both individually and as Majority Leader and Vice Chairman of the Committee on Rules, Privileges, and Elections of the Council of the City of New York, THE COUNCIL OF THE CITY OF NEW YORK, MELVIN MARKUS, both individually and as Chairman of the Council Redistricting Commission, and THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS, IN OPPOSITION

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QUESTION PRESENTED

Did the postponement of the scheduled primary election, pursuant to Court order, Herron v. Koch, 523 F. Supp. 167 (S.D.N.Y., E.D.N.Y., 1981), application for stay denied, 453 U.S. 946 (1981), enjoining the election based on the Attorney General's failure to issue preclearance for the City's redistricting plan, required by the Voting Rights Act, deprive plaintiff, a candidate, of due process of law?

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-14a) is unreported. The opinion of the District

Court (Pet. App. 5a-19a) is reported at 586 F. Supp. 77.

JURISDICTION

The judgment of the Court of Appeals was entered on November 29, 1984. The petition for a writ of certiorari was filed on February 16, 1985. The jurisdiction of this Court is invoked under 28 US.C. 1254(1).

FACT STATEMENT

Background of Postponement of the Election

Three counties in the City of New York - Kings, New York, and Bronx - are subject to the preclearance requirements of Section 5 of the Voting Rights Act, 42 U.S.C. §1973(c) (A25).* These counties are thus required to obtain federal approval before implementing "any voting qualification or prerequisite to voting, or standard practice or

*Numbers in parentheses refer to pages of the Appendix before the Court of Appeals.

procedure" different from that in effect on the date coverage was determined. 42 U.S.C. §1973(c). A covered jurisdiction may satisfy this requirement by obtaining approval either from the United States District Court for the District of Columbia or from the Attorney General of the United States. Once a proposed plan is submitted to the Attorney General, he has sixty days to approve the plan or interpose an objection. 42 U.S.C. §1973(c). The sixty day period may be shortened if the jurisdiction requests expedited review. 42 U.S.C. §1973(c), see also, 28 C.F.R. §51.32. If, however, the Attorney General requests additional information, the sixty day period begins to run anew. 28 C.F.R. §51.35 (1982).

On May 29, 1981 the New York City Council adopted a redistricting plan which divided the City into 35 councilmanic districts. On June 6, 1981, Mayor Koch signed this plan into law as Local Law 47 (A9).

Less than one week after the redistricting plan became law, on June 12, 1981, the City submitted the plan to the Attorney General, requesting

expedited review. Shortly before the sixty day review period would have expired, the Attorney General requested additional information and the review period was extended. Thereafter, several citizens brought actions seeking an injunction against any election, on the ground that the redistricting plan violated the Voting Rights Act. The City opposed the injunction based on the proximity of the election and the fact that the City and the candidates had expended irrecoverable time and money. Nonetheless, on September 8, 1981, a three judge court, convened pursuant to 28 U.S.C. §2284, granted the injunction. The City's urgent efforts to stay application of this order were unsuccessful when the United States Supreme Court denied the City's application one day before the scheduled primary election. Herron v. Koch, 523 F. Supp. 167 (S.D.N.Y., E.D.N.Y., 1981), application for stay denied, 453 U.S. 946 (1981).

Although the injunction only applied to the three covered counties, including District 35, where

plaintiff was a candidate,* to avoid confusion, the City postponed the primary election scheduled for September 10, 1981, and the November 3, 1981 councilmanic election, in all five counties. On October 27, 1981, the Justice Department informed the City that it had failed to establish that the redistricting plan was drawn without a racially discriminatory purpose and denied preclearance. A new redistricting plan, Local Law 22 of 1982, signed into law on May 2, 1982, was approved by the Justice Department on June 9, 1982. Councilmanic primary elections were held on September 23, 1982, the date established by the State Legislature.**

Plaintiff's 42 U.S.C. §1983 Action

On January 17, 1983, plaintiff commenced an action pursuant to 42 U.S.C. §1983. Plaintiff, who

*District 35 is located partially in Kings County and partially in Richmond County. Local Law 47.

**Plaintiff ran in this election, seeking the Democratic nomination for the 35th councilmanic district. He was defeated (A26).

qualified for the ballot in the councilmanic primary election originally scheduled for September 10, 1981 (A8), claimed that he had expended considerable time and money in reliance on the election schedule published by the New York City Board of Elections and claimed that defendants had negligently failed to obtain preclearance before September 10, 1981 (A10). Plaintiff claimed that, as a result of defendants' negligence, he was deprived of his constitutional right to run for the public office of council member in the 1981 primary election. Plaintiff sought damages of $400,000. Defendants demanded judgment dismissing the complaint on the ground that the Court lacked subject matter jurisdiction and that defendants did not violate any rights guaranteed the plaintiff.

ARGUMENT

FURTHER REVIEW IS NOT WARRANTED IN THIS CASE BECAUSE THE DECISION OF THE COURT OF APPEALS THAT THE POSTPONEMENT OF THE ELECTION DID NOT DEPRIVE PETITIONER OF DUE PROCESS.

This Court has held that the right to vote or run for public office is not "per se" guaranteed by the federal constitution. Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9 (1982). See also, Snowden v. Hughes, 321 U.S. 1 (1944). Thus, a violation of due process may be found in a state election only "if the election process itself reaches the point of patent and fundamental unfairness" Griffin v. Burns, 570 F2d 1065, 1078 (1st Cir., 1978). See also Duncan v. Poythress, 657 F2d 691 (5th Cir., 1981); Briscoe v. Kusper, 435 F2d 1046 (7th Cir., 1972). Petitioner cannot argue that the City's postponement of the primary election, pursuant to a Court order finding possible noncompliance with the Voting Rights Act, was fundamentally unfair. Significantly, the primary election, in which

petitioner ran and was defeated, was held a year later, and thus petitioner's opportunity to run for office was not abrogated but merely delayed. Moreover, there is no allegation that the postponement of the election invidiously disadvantaged petitioner vis a vis the other candidates.

The Court of Appeals properly relied on American Party of Texas v. White, 415 U.S. 767, 781 (1974) which established that the right to appear on the ballot as a candidate for public office is subject to reasonable conditions and qualifications (Pet. App., p. 3A). While accepting this principle, petitioner now argues that the Court of Appeals decision is wrong because the measures taken by the City were not reasonable (Pet. Br., p. 9-10). In support of this argument, petitioner relies on the finding of the three judge district court in Herron v. Koch, 523 F. Supp. 167, 174 (S.D.N.Y., E.D.N.Y., 1981) application for stay den'd 453 U.S. 946 (1981), that while the City did not act in bad faith it "consciously chose a course of action that was not

designed to facilitate a swift and complete review by the Attorney General." This finding was based on the fact that the City did not supply the Attorney General with certain optional information. However, respondents stress that the City complied fully with all statutory requirements. Moreover, the City completed its initial submission well in advance of the scheduled primary election, and requested expedited review. Even assuming, arguendo, that the City's failure to supply the optional information was negligent, this does not establish that the postponement of the primary election in order to comply with federal law was an unreasonable restriction upon petitioner's right to run for public office.

There is no conflict between the decision of the Court of Appeals herein and Perkins v. Matthews, 400 U.S. 379 (1971) as petitioner asserts (Pet. br., p. 8). In Perkins, the plaintiffs sought to enjoin an election based on the failure of Canton, Mississippi to obtain preclearance for certain changes. The municipality opposed this relief, and

this Court, while remanding to the District Court for a determination of the proper remedy, stated inter alia, 400 U.S. at 396:

> Moreover, based upon ample proof of repeated evasion of court decrees and of extended litigation designed to delay the implementation of federal constitutional rights, Congress expressly indicated its intention that the States and subdivisions, rather than citizens seeking to exercise their rights, bear the burden of delays in litigation.

It is obvious that this language has no bearing on the situation herein, where the municipality postponed the election in order to comply with federal law. Thus, this issue does not require resolution by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

March 15, 1985

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED

Whether denial of a candidate's right to appear on the ballot for a municipal election, resulting from the failure of the municipality to comply timely with preclearance requirements of 42 U.S.C. 1973, et seq., is a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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ARGUMENT

FURTHER REVIEW IS WARRANTED IN THIS CASE BECAUSE THE COURT OF APPEALS ERRED IN HOLDING THAT POSTPONEMENT OF COUNCIL ELECTIONS WAS REASONABLE AS A MATTER OF LAW AND DID NOT DEPRIVE PETITIONER OF DUE PROCESS.

Respondents argue that the right to vote or run for public office is not per se constitutionally guaranteed, relying on Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9 (1982). Respondents' reliance is misplaced. In Rodriguez, appellants challenged a valid state statute that provided for interim appointments rather than general elections to fill legislative vacancies. The Court's holding that the right to vote per se is not constitutionally protected means only that states may choose to have certain officials selected by means other than popular election. Hadley v. Junior College District, 397 U.S. 50 (1970). Such holding has no relevance to the

instant case. Once a state chooses popular election as the means for selecting public officers, as in the instant case, such election must be carried out in accordance with Constitutional requirements. Moore v. Ogilvie, 394 U.S. 814, 818.

Respondents also contend that the Court of Appeals decision in the instant case does not conflict with Perkins v. Matthews, 400 U.S. 379 (1971). Respondents cite the Court's prefatory remarks, Perkins 400 U.S. at 396:

> Moreover, based upon ample proof of repeated evasion of Court decrees and of extended litigation designed to delay the implementation of federal constitutional rights...

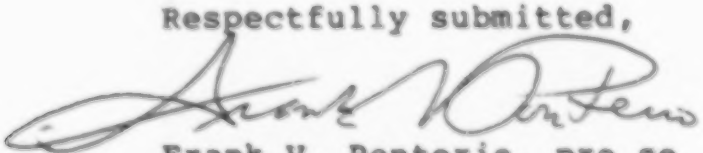
and assert that this "language" has no bearing on the instant case. Again, respondents' assertion is irrelevant. The language cited by respondents had no bearing on the circumstances in Perkins

either. It was merely dictum expressing the underlying reason for Congress enacting the preclearance provisions of the Voting Rights Act of 1965, 42 U.S.C. 1973 (c), and not part of the Court's holding. See 1965 U.S. Code Cong. and Adm. News, p. 2437, 2441. There was in Perkins no evasion of Court decrees or extended litigation. Both Perkins and the instant case involved a municipality's attempts to enforce changes in voting requirements, including redistricting, without first obtaining preclearance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: March 26, 1985